

Mr. Castillo was employed as a laborer for Myers Turf. He alleged that on November 9, 2006, he was struck by a box that was being dragged behind a tractor in

order to smooth out the dirt. The ground was being prepared for sod. His job duty was to pick up rocks and debris behind the tractor. Initially, Wayne Clay was operating the tractor but was later relieved by Wayne Burns, claimant's supervisor. Claimant alleged Mr. Burns was driving the tractor erratically in a donut maneuver. It became very dusty and claimant was struck by the tractor's blade in his right knee which threw him against a fence injuring his back and wrist.

Mr. Burns denied he struck the claimant while driving the tractor and noted that it was not possible for him to drive recklessly in circles because there were sprinklers around the edges, valve boxes in the middle and all you could do was make a circle path. He noted that there were approximately seven people working in the backyard and that it was not dusty. Finally, he saw the claimant leaving the job site on his bicycle on the day of the alleged accident.

On November 9, 2006, Wayne Clay was riding the tractor until late in the day when Mr. Burns took over so that Mr. Clay could use a shovel. Mr. Clay corroborated Mr. Burns' testimony that it was not dusty, the sprinkler heads were in place and he did not see claimant get hit by the tractor. Mr. Clay testified:

Q. Did you see Mr. Burns ever strike Mr. Castillo with the tractor?

A. No.

Q. And Mr. Castillo testified not only was he struck but pinned up against the fence that's seen in those photographs. Did you ever observe him up against the fence?

A. No.¹

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Q. Did you see Mr. Castillo again as he left for the day?

A. Yes.

Q. Did you see him ride his bike?

A. Yes.

Q. Did he appear to be in any – experiencing any problem riding his bike?

¹ P.H. Trans. (Feb. 15, 2007) at 44.

A. I didn't pay any attention. He seemed to be on his bike. Hop in the truck, go home.²

On the day after the alleged accident Mr. Burns directed claimant to shovel some dirt into a hole and an argument followed whereupon claimant directed derogatory and obscene remarks at Mr. Burns. Mr. Clay was present and heard claimant's foul language directed at Mr. Burns. Mr. Burns called his supervisor to come get claimant as he was fired.

David Dougan testified he picked up the claimant due to Mr. Burns' call. Claimant had advised him that Mr. Burns should be tested for drugs since he was driving erratically. Mr. Dougan testified the claimant did not advise him about the accident, needing medical treatment or even the need to fill out an accident report. On November 14, 2006, claimant sought treatment at Olathe Medical Center due to his knee, wrist and back pain.

After he became aware that claimant was alleging an accidental injury on November 9, 2006, Mr. Dougan then interviewed claimant's co-workers who were at the same job site that day and none had observed claimant get hurt.

The claimant's version of his accidental injury is corroborated by his roommate who said that on the evening of November 9, 2006, claimant had told him about the accident. However, claimant's supervisor denied the accident occurred as did Mr. Clay who was also working in the backyard. Mr. Dougan denied claimant told him about the alleged accident and upon investigation by Mr. Dougan, several of claimant's co-workers at the job site signed a document stating they did not see claimant get hit by the tractor nor hear him complain of such injuries. Moreover, claimant did not seek medical attention nor provide notice of his accident until after he was terminated from employment with respondent.

This Board Member finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed their testimony over the claimant's testimony. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. The ALJ's Preliminary Decision is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this

² *Id.* at 45-46.

³ K.S.A. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Robert H. Foerschler dated February 21, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2007.

BOARD MEMBER

c: David Curotto, Attorney for Claimant
Bill W. Richerson, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge

⁴ K.S.A. 2006 Supp. 44-555c(k).